UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBTELECOM SH.A.,

Petitioner,

v.

UNIFI COMMUNICATIONS, INC.,

Respondent.

16-CV-09001 (PAE)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF UNIFI COMMUNICATIONS, INC.'S CROSS-MOTION TO DISMISS OR STAY THE PETITION

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Respondent, Unifi Communications, Inc. ("Unifi"), respectfully submits this reply memorandum of law in further support of its cross-motion to dismiss or stay Petitioner Albtelecom, Sh.a.'s ("Albtelecom") Petition, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted at* 9 U.S.C. § 201 (the "New York Convention" or the "Convention"), to confirm a foreign consent arbitration award (the "Consent Award") and enter judgment thereon (ECF Nos. 1-3).

PRELIMINARY REPLY STATEMENT

As set forth in Unifi's moving brief, Albtelecom's Petition should be: (1) dismissed because the New York Convention does not apply to the Consent Award; or (2) stayed because Unifi initiated a new arbitration in Switzerland; or (3) denied insofar as it seeks entry of a judgment against Unifi.

In response, Albtelecom argues that:

- The Consent Award is enforceable under the New York Convention.
- Albtelecom has "irrefutable evidence" to demonstrate that the parties did not agree to suspend or delay Unifi's payments under the Consent Award.
- The Petition should not be stayed because the new Swiss arbitration is based on the parties' settlement agreement—not the Consent Award.
- This Court can "shape an appropriate remedy" under the circumstances.

Albtelecom maintains these arguments even though it concedes that the "factual issue arising out of the alleged deferment of scheduled payments … is a matter for arbitration under the settlement agreement and not a matter in the summary proceedings for the enforcement of the Consent Award before this Court." (ECF No. 22 at 14.)

Albtelecom's arguments are easily refuted. First, Albtelecom fails to cite controlling authority for the proposition that the New York Convention applies to a consent award issued in Switzerland.

Second, Albtelecom fails to offer an explanation for the 10-month delay in issuing a default notice under the Consent Award. Instead, Albtelecom offers an unsworn hearsay statement made by Erkan Tabak, its former CEO. Mr. Tabak's one-line email statement is inadmissible hearsay and unreliable. As Mr. Tabak stated during a recent face-to-face meeting with Unifi's CEO, he is physically and financially afraid of Albtelecom's owner. At best, Albtelecom has created genuine issues of material fact requiring a hearing.

Third, contrary to Albtelecom's allegations, the new pending Swiss arbitration is based on both the settlement agreement *and* the Consent Award—the settlement terms were incorporated and reproduced in full as part of the Consent Award.

Finally, Albtelecom should not be permitted to rewrite the terms of the Consent Award. In the event of a default, Albtelecom may make a *claim* for an accelerated, lump sum amount. There is no language in the Consent Award providing that Albtelecom is automatically entitled to a lump sum judgment absent a showing that Unifi is in breach of the Consent Award. Even if the Petition is treated as a breach of contract claim, there exist genuine issues of material fact warranting denial of summary judgment.

ARGUMENT

I. THE NEW YORK CONVENTION DOES NOT APPLY IN THIS CASE

In its moving brief, Unifi demonstrated that the New York Convention "is silent on the question of its applicability to decisions that record the terms of a settlement between the parties" and that "[d]uring the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon." (ECF No. 20 at 12 (quoting the United Nations Commission on International Trade ("UNCITRAL") Secretariat Guide on the New York Convention, 2016 Edition (the "Guide") (ECF No. 16-2)).) Thus, as previously noted, the drafters of the Convention declined to include foreign consent awards when this specific issue was raised—even in the face of any pro-enforcement bias. (*Id.*)

In response, Albtelecom contends that *U.S. v. Sperry Corp.*, 493 U.S. 52 (1989) requires a different result. Albtelecom's argument is misplaced as the consent award in *Sperry* was not enforceable by reference to the New York Convention. The settlement agreement in *Sperry* was between a foreign government (Iran) and an American company, and it was entered as a consent award by an international arbitral tribunal established by the United States and Iran as part of resolving the Iran hostage crisis in 1979 for the specific purpose of allowing Americans to enforce their claims against *Iran*. *Id.* at 55-57.

The *Sperry* Award was enforceable only as a result of a specific agreement between Iran and the United States known as the Algiers Accords. *Id.* Under the agreement between the two countries, the *Sperry* award was "enforceable…in the courts of any nation in accordance with its laws." *Id.* at 56-57 (quoting the Algiers Accords). As noted above, the New York Convention is silent on its applicability to consent awards and, unlike *Sperry*, there is no other controlling agreement which Albtelecom can rely upon in support of its application.

The remaining authorities cited by Albtelecom also bear no resemblance to the instant case. For example, in *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, Docket Nos. 15-113-cv(L), 15-1146-cv(CON), 2017 WL 816878 (2d Cir. March 2, 2017), the court did not opine on matters concerning the enforcement of a consent award.[1] The *CBF* award was not a consent award. In *CBF*, the International Chamber of Commerce (the "ICC") in Paris rendered a $48 million arbitral award *after* it conducted several hearings and the respondent ultimately admitted to all claims and damages. *CBF*, 2017 WL 816878, at *5-6.

In applying the New York Convention, the Second Circuit noted that the *CBF* "litigation presents a classic case of a foreign arbitral award." *Id.* at *9. In contrast, here, the parties agreed to settle their disputes *outside* of arbitration and simply asked the arbitrator to incorporate the terms of their negotiated agreement into the Consent Award. The arbitrator in this case did not decide *any* aspect of the parties' underlying dispute on the merits and/or issue a lump sum award. Instead, the parties agreed on a payment plan with a default provision. *CBF* is thus inapplicable.

Similarly unavailing are *Bakers Union Factory # 326 v. ITT Continental Baking Co., Inc.*, 749 F.2d 350 (6th Cir. 1984) and *Assemi v. Assemi (In re Marriage of Farid and Shirin Assemi)*, 872, P.2d 1190 (Cal. 1994). Both cases are not controlling as they dealt with domestic—not foreign—awards.

Albtelecom also cites to the following statement made by an Austrian delegate during the negotiation of the New York Convention: "it will depend on the law of the State in which an award is to be enforced whether a particular decision is to be regarded as an arbitral award." (ECF No. 22 at 7-8.) This general observation is hardly dispositive. In all events, it is contradicted by the drafters of the Convention who, when confronted with the specific question of the applicability of the Convention to foreign *consent* awards, declined to include consent awards as internationally-enforceable arbitral awards. (ECF No. 16-2 ("…the issue of the application of the Convention to such decisions was raised, but not decided upon.").)

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[1] It appears that Albtelecom is also relying on an amicus brief filed in *CBF*. (*See* ECF No. 22 at 7.) If so, the quote from the amicus brief is not controlling and it appears that the brief played no role in the Second Circuit's decision in *CBF*.

Finally, Albtelecom cites to several rules and treatises stating that an arbitration tribunal may record a settlement in the form of an award. (ECF No. 22 at 8-9.) This is not a remarkable proposition. These authorities, however, do not support the conclusion that the Consent Award is enforceable under the New York Convention.

II. ALBTELECOM FAILS TO EXPLAIN WHY IT FAILED TO SEND A DEFAULT NOTICE FOR 10-MONTHS

In its cross-motion, Unifi demonstrated—through sworn testimony—that the parties agreed to suspend Unifi's payments pending execution of the Traffic Agreement. Unifi's CEO testified that he reached a verbal agreement with Erkan Tabak, Albtelecom's former CEO. (ECF No. 17.) Unifi also showed that Albtelecom's Swiss counsel, Christopher Bollen, confirmed—via email—that Unifi's December 2015 payment would be deferred until "one month after the conclusion of the payment schedule as set forth in the Award by Consent." (ECF No. 21-2, Ex. C-6.)

Remarkably, Mr. Bollen now contradicts his prior email. Notwithstanding the prior written agreement to defer payment, Mr. Bollen claims that "Albtelecom did not agree that Unifi could stop making payments under the Consent Award nor did the Parties agree on a new payment schedule." (ECF No. 3 ¶ 27.) Mr. Bollen, to be charitable, is mistaken. In the cross-motion, Unifi also pointed out that Albtelecom failed to submit a declaration from anyone actually employed by Albtelecom to support Mr. Bollen's allegations.

On March 17, 2017, after Unifi's cross-motion was filed, Mr. Bollen sent an email to Mr. Tabak purporting to summarize Mr. Bollen's version of the facts. (ECF No. 24-3.) Mr. Bollen further stated: "In our telephone conversation, you stated that you did not agree to the suspension of Unifi's payments … I would be grateful if you would let me know whether the above summary of our telephone conversation is correct." (*Id.*) Later that same day, Mr. Tabak replied: "Your summary is correct." (*Id.*) Now, in opposition to Unifi's cross-motion, Albtelecom points to Mr. Tabak's email as "irrefutable evidence" that the parties did not agree to suspend or delay payments under the Consent Award.

As an initial matter, this Court should disregard Mr. Tabak's one-line response to Mr. Bollen's prompting email on the grounds that it is an unsworn hearsay statement and it is inadmissible. In addition, as Mr. Tabak stated during a recent face-to-face meeting with Unifi's CEO, he is physically and financially afraid of Albtelecom's owner. (Supplemental Declaration of Adrian Shatku, dated April 7, 2017 ("Suppl. Shatku Decl."), ¶ 7.) Mr. Tabak further stated that he wanted to help Unifi by confirming the parties' prior agreement to suspend payments, but he did not want to cross Albtelecom's owner. (*Id.* ¶¶ 6-11.) Tellingly, Mr. Tabak's and Mr. Bollen's March 17, 2017 email exchange fails to explain why Albtelecom did not serve any formal default notices or otherwise request payment during the 10-month period. (ECF No. 24-3.) Albtelecom's submission, at best, only creates genuine issues of material fact which cannot be resolved without a hearing.

III. THE NEW SWISS ARBITRATION ARISES OUT OF THE CONSENT AWARD AND THE PARTIES' SETTLEMENT AGREEMENT

In its opposition, Albtelecom argues that the Petition should not be stayed because the new arbitration is based only on the parties' settlement agreement. According to Albtelecom, "[t]he settlement agreement is an agreement between the parties subject to arbitration of disputes arising out of that settlement agreement [and] [t]he Consent Award as a final decision of another arbitration panel stands alone." (ECF No. 22 at 20.) The parties, however, asked the arbitrator to incorporate and reproduce the terms of their settlement agreement as the Consent Award. (ECF No. 16-1 ¶¶ 100, 114 ("the Parties 'agree that the terms of their settlement shall be incorporated into a consent award…'") (quoting the settlement agreement).) Thus, contrary to Albtelecom's contentions, the new Swiss arbitration clearly implicates both the Consent Award and the settlement agreement. Staying the Petition would avoid the possibility of inconsistent results concerning the enforceability of the parties' agreement to suspend Unifi's payments under the Consent Award.

IV. THE TERMS OF THE CONSENT AWARD ARE CLEAR AND SHOULD NOT BE MODIFIED

In its opposition, Albtelecom tacitly concedes the weaknesses of the Petition when it asks this Court to: (1) interpret "what the arbitrator intended" in issuing the Consent Award; and (2) "shape an appropriate remedy" by entering judgment on the outstanding installment payments and the remaining installment payments. (ECF No. 22 at 15-18.) Albtelecom offers no authority whatsoever for asking this Court to rewrite the terms of the Consent Award.[2] In fact, Albtelecom concedes that the "**factual issue arising out of the alleged deferment of scheduled payments … is a matter for arbitration under the settlement agreement and not a matter in the summary proceedings for the enforcement of the Consent Award before this Court**." (ECF No. 22 at 14 (emphasis added).)

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[2] For example, in *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974) and in *Admart AG v. Stephen and Mary Birch Foundation, Inc.*, 457 F.3d 302 (3d Cir. 2005), the Second and Third Circuits considered minor modifications to a confirmation judgment—such as an arithmetical error; whether $4,750 should have been included for arbitration expenses; and how to transfer possession of art. In *Parsons* and *Admart*, however, despite these issues, the substance of the awards remained intact. *Id.*

In all events, this Court does not need to interpret what the arbitrator intended because the *parties* effectively drafted the Consent Award based on the negotiated terms of their settlement agreement.[3] Second, the Court should decline the offer to craft a new award because the terms of the existing Consent Award are unambiguous. In the event of a breach, Albtelecom may make a *claim* for an accelerated, lump sum amount—minus payments made to date. Simply stated, Albtelecom is in the same position as any other litigant who claims that the opposing party breached the terms of their settlement agreement. The same result occurs even if the Court converts the Petition into a breach of contract action under the Consent Award due to the existence of multiple genuine issues of material fact warranting denial of summary judgment.

CONCLUSION

For the foregoing reasons, the Court should dismiss, stay or deny the Petition to the extent that no judgment be entered against Unifi.

Dated: New York, New York
April 7, 2017

Respectfully submitted,

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[3] The balance of cases cited by Albtelecom are all distinguishable because they deal with arbitral awards and decisions—not consent awards. *E.g.*, *Zeiler v. Deitsch*, 500 F.3d 157, 169 (2d Cir. 2007) ("the arbitrators were asked to preside over the continuing process of sorting out the details of a commercial relationship, entering operative decisions along the way"); *Sailfrog Software, Inc. v. TheOnRamp Group, Inc.*, No. 97-7014, 1998 WL 30100 (N.D. Cal. 1998).